

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LASHAWN JERMALE LIKELY,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 267382

Kent Circuit Court

LC No. 04-003188-FH

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentences imposed on his plea-based convictions of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to concurrent terms of 14 months to 20 years in prison for the possession conviction, and 14 months to 2 years in prison for the resisting and obstructing conviction. We vacate defendant's sentences and remand for further proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In return for defendant's plea, the prosecutor agreed to dismiss two other charges of possession with intent to deliver cocaine and also agreed not to seek habitual offender sentence enhancement. The prosecutor also stated that he "would agree to stay out of the sentencing and leave it to the discretion of the Court." Asked whether the statements were accurate, defense counsel replied:

[COUNSEL]. Yes, your Honor, with the addition that I spoke to Mr. Becker and asked if there was a possibility of a recommendation from the prosecutor's office of a year in the county jail. Mr. Becker said that he could not make that recommendation, but I was free to approach the Court and make that request to the Court. We met in chambers last week, and you advised me that as long as it was a sentence that was possible within the guidelines, that you would agree to be--to sentence Mr. Likely to a year in the county jail.

THE COURT. You understand if I change my mind after reviewing the presentence report, I'm going to--I'm going to let you know, and not be bound by that, I'll give him an opportunity to withdraw, but I'm not going to--but it will be at that point, you understand?

[COUNSEL]. I understand, and I advised Mr. Likely that ultimate decision was with you, but you would review the presentence report, and if the guidelines as figured by the presentence investigator called for were allowed.

THE COURT. And if it's not, there's no assurance for a county cap, right, do you understand that, Mr. Likely, if your guidelines are off the charts, if your guidelines are above county guidelines' time, you don't have a county guidelines cap, you understand that?

DEFENDANT. What's above the county guidelines?

THE COURT. If you're above 12 months on the low end of your sentence.

DEFENDANT. On the low end?

THE COURT. Yeah.

DEFENDANT. Okay.

THE COURT. I don't know what your record is, but I'm sure you're not getting a low end if your low end is above 12 months, do you understand?

DEFENDANT. Yes.

THE COURT. So if you score out at 23 to 26, you're going to go to DOC for the 23, and you're not going to have a right to withdraw. Do you understand?

DEFENDANT. Yes, your honor.

Defendant subsequently pled guilty.

The scoring of the guidelines for defendant's possession conviction resulted in a 5 to 23-month recommended minimum sentence range. Under the statutory sentencing guidelines, if the upper limit of the guidelines range exceeds 18 months and the lower limit of the range is 12 months or less, the trial court may, in its discretion, sentence a defendant to an intermediate sanction that includes a term of imprisonment not longer than 12 months. MCL 769.34(4)(c); *People v Martin*, 257 Mich App 457, 459-460; 668 NW2d 397(2003). An intermediate sanction includes jail. MCL 769.31(b)(viii); *Martin, supra* at 460. Therefore, the sentencing guidelines did not preclude a sentence to county jail, and the trial court was required to impose a sentence that either conformed to its preliminary indications or impose a higher sentence and provide defendant with an opportunity to withdraw his plea. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

After scoring the guidelines, the trial court determined that it would sentence defendant to prison, notwithstanding defendant's and defense counsel's reminder that the trial court had preliminarily indicated that it would sentence defendant to a year in the county jail if it was possible. When defendant questioned the trial court as to why it would not abide by the initial agreement, the trial court indicated that it was not "bound" to sentence defendant to jail under the agreement. Despite the previous conversation during defendant's plea proceeding, defense

counsel concurred and stated, “I think that was on the record that it was at the Court’s discretion.” The trial court provided reasons why it chose not to sentence defendant to a jail term and probation, and sentenced defendant to 14 months to 20 years in prison for his cocaine delivery conviction. The trial court did not provide defendant with the opportunity to withdraw his plea as it had earlier suggested.

Defendant argues that he has a right to withdraw his plea or be resentenced according to the terms of the sentencing agreement. We agree. A defendant who pleads guilty pursuant to a sentence agreement has an “absolute right” to withdraw the plea if the agreement is not followed. *Cobbs, supra*. Accordingly, the trial court preliminarily indicated that defendant would receive a jail sentence if the sentence did not amount to a downward departure from the sentencing guidelines, and explained that a decision to recant the preliminary indication would be accompanied by an opportunity to withdraw the plea. The trial court recanted, as was its prerogative, but failed to provide defendant with an opportunity to withdraw his plea. See *id.* The trial court sentenced defendant while under the misapprehension that it had discretion to impose the sentence without providing defendant an opportunity to withdraw his plea. Therefore, the most just, albeit incomplete,¹ remedy available for this error is to vacate defendant’s sentence and remand for resentencing with the understanding that if the new sentence exceeds the original preliminary indication, then defendant may withdraw his plea.

Defendant’s sentence is vacated and the cause is remanded to the sentencing court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O’Connell

¹ Defendant has already served his time in prison, so his request for specific performance is impossible. Moreover, remanding solely to allow defendant an opportunity to withdraw his plea does not serve any purpose but to tangle the case in a jumble of procedural knots. Defendant cannot now enjoy benefits of the original, anticipated sentence, and instead, would merely risk losing the benefits (like the lack of habitual offender status and the dropped charges) that the original agreement provided. This would essentially amount to giving defendant the Hobson’s choice of abiding the residual effects of the improperly imposed greater sentence or facing the full extent of the court’s sentencing power. Defendant did not originally opt for either, so we will not foist this choice on him now. Instead, we remand for resentencing as defendant requests. Taking this course will provide the sentencing court with an opportunity to abate, as much as is now possible, the residual effects of the higher sentence or will alternatively provide defendant the opportunity to withdraw his plea if the sentencing court insists on the sentence it originally imposed.